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No. 99-

IN THE

# Supreme Court of the United States

CITY OF KANSAS CITY, MISSOURI,

*Petitioner,*

*v.*

JILL HARMON and JOHN KEAN,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether in light of *Monell v. Department of Social Services* and its progeny a municipality may be held liable for damages under 42 U.S.C. § 1983 to a private citizen for the attempted enforcement of a constitutional ordinance by a non-municipal employee.

2. Whether the Eighth Circuit improperly narrowed the *Younger v. Harris* abstention doctrine.

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## STATEMENT OF JURISDICTION

The Eighth Circuit entered its order and judgment on October 20, 1999. The Eighth Circuit denied the City's petition for rehearing and rehearing en banc on November 24, 1999. (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATUTES, CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the right of free speech."

City of Kansas City, Missouri City Code § 50-2 provides:

> No person shall sell, solicit or offer for sale or hawk or peddle any article, thing or personal service, except newspapers and magazines, in or upon any street, sidewalk, alley, public way, public building, public park or place in the city; provided that nothing contained in this section shall be construed to prohibit the sale of articles from traveling florists or grocers; hucksters, as defined in § 40-108; food or beverage wagons, including any street vendor of food regulated by the Health Department as a food vendor selling food in or upon any street, sidewalk, alley, public way, building or place not controlled by the Board of Parks and Recreation Commissioners; or vendors of milk and dairy products and hot tamales; or producers of farm products as defined in RSMo 71.630; or businesses which are wholly located on private property but which sell articles to persons on the public sidewalk; provided, further, this section shall not be deemed to apply to the sale of any personal property at any established place in any public building, public park or public place by express authority of the government agency in control thereof. City of Kansas City, Missouri City Code § 50-2 passed 1967, amended 1983 and 1986.

## STATEMENT OF THE CASE

This case involves a 42 U.S.C. § 1983, First Amendment claim brought against Petitioner City of Kansas City, Missouri (the "City" or "petitioner") by respondents Jill Harmon and John Kean ("Harmon and Kean" or "respondents") claiming that Kansas City, Missouri, Code of Ordinances § 50-2 ("§ 50-2" or "ordinance") was unconstitutional and sought an order enjoining its enforcement because the ordinance violated their First Amendment right to free speech. Respondents also sought money damages. The District Court of the Western District of Missouri, Western Division was the Court of first instance and it had jurisdiction pursuant to 28 U.S.C. § 1331.

Harmon had been cited for violating the ordinance, which prohibits sales of certain items on sidewalks. Harmon believed and the District Court ultimately found that her activities had not in fact violated the ordinance because she did not sell her items, but rather gave items away while seeking donations. Rather than asserting this factual defense in Municipal Court, Harmon and her partner Kean filed suit in Federal District Court challenging the constitutionality of the ordinance. The District Court held the ordinance to be unconstitutional on its face and as applied by the Police Officer that ticketed Harmon. The City appealed this decision and ultimately, Harmon and Kean were awarded $139,000 in damages and attorneys fees, although the Eighth Circuit did not affirm the decision of the District Court that the ordinance was unconstitutional.

The following facts are taken from the Eight Circuit opinion. (App. A). Since 1996, Harmon and Kean, also known as the "Butterflies," have actively sought to spread

their beliefs regarding personal, social, and political issues on the public sidewalks in Kansas City. Their message, in part, has been delivered by the distribution of "symbolic expressions" regarding the homeless and the hungry, including anklets, bracelets, and wood products. In addition, they distribute pamphlets with pictures to address topics such as equality, hunger, prevention of and recovery from abuse, healing, spiritual injuries, and love. None of these items contain words. Although Respondents do not sell these items, they do request a donation for them. The money raised from donations is used to create more pamphlets and jewelry and to purchase food for the hungry.

On July 19, 1996, Harmon and Kean had spread out their blankets and trinkets on the corner of 11th and Main Street in Kansas City, when two Police Department officers approached them. The officers told Respondents to leave the area or they would be arrested. In the midst of this encounter, a woman in the crowd approached Harmon and inquired as to the price of a bracelet. Harmon requested a seven-dollar donation. At that point, an officer informed Harmon that she had violated § 50-2 of the Kansas City Code by attempting to sell an item on a city sidewalk and issued her a citation.

On April 7, 1997, Respondents filed a pro se action in District Court against the City seeking damages and declaratory and injunctive relief on the basis that § 50-2 is facially unconstitutional and unconstitutional as applied under the First and Fourteenth Amendments. On May 13, 1997, the City filed a motion to dismiss or to stay the proceedings in the federal case. The City first asserted that *Younger* abstention was proper because a case was pending against Harmon in Municipal Court for an alleged violation of § 50-2 in which Harmon had filed a motion challenging

the constitutionality of the ordinance. Secondly, the City argued that Kean lacked standing to challenge the constitutionality of the ordinance because he had neither been arrested nor charged with violating § 50-2.

The District Court applied *Younger* abstention as to Harmon and therefore, dismissed her from the federal suit without prejudice. As to Kean, the court refused to abstain from the case and further, found that he possessed standing to challenge the ordinance despite the fact that he had not been arrested or given a citation. (*See also* App. D, p. 49a-51a). The parties filed cross motions for summary judgment. The District Court proceeded to hold that § 50-2 was unconstitutional as applied to Kean and on its face and therefore, granted summary judgment in his favor, and enjoined enforcement of the ordinance. (*See also* App. C, p. 18a-48a). Subsequent to this ruling, the City dismissed its Municipal Court case against Harmon. On May 26, 1998, the District Court granted Harmon's motion for reconsideration and reinstated her claim, extending the scope of the April 2, 1998, summary judgment order to Harmon based on its belief that both Respondents engaged in the same activity at the same time. (*See also* App. B, p. 16a-17a). The District Court found that Harmon's conduct did not violate the ordinance.

On June 11, 1998, the District Court held a bench trial to determine damages for Harmon and Kean, resulting in an award of $25,000 to Harmon and $10,000 to Kean. The court later awarded a total of $73,576.25 in attorney's fees. Moreover, the District Court permanently enjoined the City from enforcing § 50-2.

The City timely appealed the District Court's decision as to the monetary and injunctive relief, and attorney's fees to the Court of Appeals for the Eighth Circuit.

On October 20, 1999, the validity of the ordinance was upheld by the Eighth Circuit, which ruled that the ordinance did not prohibit Harmon and Kean's activities that are protected under the First Amendment. (App. A, p. 12a). The Eighth Circuit vacated the District Court's order declaring the ordinance unconstitutional and enjoining its enforcement. (App. A, p. 13a). The Eighth Circuit agreed with the District Court's finding that the City and the Police Department are separate legal entities. (App. A, p. 10a n.6). However, the Eighth Circuit held that despite the fact that the City and Police Department are separate legal entities, the City has to pay money damages to Harmon and Kean for the actions of a Police Department employee who cited Harmon in this action for a violation of § 50-2. (App. A, p. 14a). It is this portion of the Eighth Circuit decision that allowed the award of damages and attorney's fees (including the Eighth Circuit's award of another $30,000 in attorney's fees for appellate work) to stand that the City seeks relief from.

## REASONS FOR GRANTING THE WRIT

### I.

### A MUNICIPALITY IS NOT LIABLE UNDER 42 U.S.C. "SECTION" 1983 TO A PRIVATE CITIZEN FOR THE ATTEMPTED ENFORCEMENT OF A CONSTITUTIONAL ORDINANCE BY A NON-MUNICIPAL EMPLOYEE.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

"A civil rights plaintiff cannot pursue a § 1983 action against a municipality or officials under a respondeat-superior theory." *Monell v. New York City Dep't. of Soc. Services*, 436 U.S. 658, 690 (1978). "Only when the employee is acting pursuant to an official policy or custom of the City can the City be held liable under § 1983." *Id.*

A survey of recent Circuit Court decisions reveals that no other Circuit has extended municipal liability under similar circumstances as the Eighth Circuit did in this case: *Fletcher v. Town of Clinton*, __ F.3d __, 1999 WL 997806, P. 11-12 (1st Cir. 1999) (for liability the action must implement or execute a policy statement, ordinance,

regulation, or decision officially adopted and promulgated by [the municipality's] officers or is pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision making channels); *Morris v. Lindau*, __ F.3d __, 1999 WL 961738 (2nd Cir. 1999) (a municipality can be held liable only if the alleged unconstitutional action implements an official "policy or custom [of the municipality], whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy); *Carter v. City of Philadelphia*, 181 F.3d 356-357 (3rd Cir. 1999) (there can be no county liability here because under Virginia law Fairfax County has no control over the internal administration of the Adult Department of Correction); *Grayson v. Peed*, __ F.3d __, 1999 WL 1004425, page 5 (4th Cir. 1999) (no control over employee, no liability); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 470-71 (5th Cir. 1999) (act of a policy maker or employee following policy maker's lead imposes liability); *DePiero v. City of Macedonia*, 180 F.3d 770, 785 (6th Cir. 1999) (no municipal liability for acts of employees or agents); *Kujawski v. Board of Commissioners of Bartholomew County, Ind.*, 183 F.3d 734, 737 (7th Cir. 1999) ("Our case law establishes that a plaintiff may demonstrate the existence of municipal policy or custom in one of three ways: proof of an express policy causing the loss, a widespread practice constituting custom or usage that caused the loss, or causation of the loss by a person with final policymaking authority."); *Christie v. Iopa*, 176 F.3d 1231, 1236 (9th Cir, 1999) (no policy maker involvement, no municipal liability); and *Jantzen v. Hawkins*, 188 F.3d 1247, 1259 (10th Cir. 1999) ("municipality cannot be held liable under § 1983 for acts of a *municipal official* (emphasis added) . . . unless that official possesses final policymaking authority to establish municipal policy with respect to the acts in question").

The City's ordinance which is at issue in this action, § 50-2, was originally passed in 1967 and amended in 1983 and 1986. Harmon and Kean began their activities in 1996. The decision to issue a citation Harmon for violation of § 50-2 was made by Kansas City, Missouri Police Department officers. The District Court found that § 50-2 did not prohibit Harmon and Kean's protected activities because they do not propose a "commercial transaction." (App. C, p. 32a). Therefore the Police Officer was mistaken when he wrote the citation for violation of § 50-2. It is clear from the record that § 50-2 was not enacted in 1967 with the Respondents in mind. For the Eighth Circuit to hold that § 50-2 somehow enabled the Police officers to harass Harmon, or Kean just does not follow.

Under United States Supreme Court precedent, a party may only be liable under § 1983 for damages if it proximately caused the claimed deprivation. In this case, the Eighth Circuit reviewed the record and agreed with the City that the Police Department was the sole source of the specific tactics used against Harmon and Kean. The Eighth Circuit also agreed that the City and the Police Department are separate legal entities. The Eighth Circuit vacated the declaratory and injunctive relief awarded, but then affirmed both the damages and attorney's fee awards entered by the District Court based on the finding that the City should be liable for the actions of the Police Department employees based on, "the mere attempt to enforce § 50-2 (the ordinance)." (App. A, p. 10a n.6). Under *Monell*, the Board of Police Commissioners, which is the governmental body responsible for the police department under Missouri law, could not be held liable for the actions of an individual officer in mistakenly citing someone, unless there was found to be a lack of training by the police department. RSMo 84.350

and 84.240; *Hasenmeyer v. Board of Police Commissioners of Kansas City*, 606 S.W.2d 468 (Mo. App. 1980); *Williams v. City of Kansas City*, 841 S.W.2d 193, 195 n.2 (Mo. App. 1992); *City of Canton v. Harris*, 489 U.S. 378, 387-92 (1989) (if a valid policy is unconstitutionally applied by a municipal employee, the municipality can be liable under § 1983 only if its failure to train the employee amounts to deliberate indifference to the constitutional rights of its inhabitants). Any lack of training was not an issue in the present case, nor could it be because the City is not the officer's employer, the Police Department is his employer. Therefore, although the Police Department could not be held liable for the actions of its officers without a showing of deliberate indifference, the City, whose only action was to pass § 50-2, the constitutional validity of which was not reached by the Eighth Circuit, was held liable because a police officer cited Harmon because he mistakenly believed that she had violated the ordinance. This result clearly conflicts with decisions in the United States Supreme Court which hold that a municipality cannot be held vicariously liable for its employees actions. So even if the City had employed the police officer, it would not be liable. No other Circuit has extended liability on the basis that if a municipality enacts an ordinance that is constitutionally valid, the municipality may be held liable for its mistaken enforcement by a non-municipal employee. If the City is to be held liable every time an officer, employee or not, mistakenly cites someone for violation of a constitutionally valid ordinance, then the doors to federal court would open as flood gates. "The constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted–indeed, for every suspect released." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). "[N]o one has a constitutional right to be free from a law officer's honest

misunderstanding of law or facts in making an arrest." *Gabbard v. Rose*, 359 F.2d 182, 185 (6th Cir. 1966).

The Eighth Circuit found that the City should be liable for damages based on the police officer's mistaken interpretation of this ordinance and attributed that interpretation to the City:

> § 50-2 *has been* applied to Kean and Harmon. No amount of linguistic argument, however correct, can erase this fact. Harmon was formally cited for violating the ordinance; Kean was threatened with sanction by officers who advanced § 50-2 as their justification. If the City were to absolve itself of liability for prior wrongs simply by recanting an interpretation of a statute it had wrongly applied, it would create a serious gap in the protection intended by federal civil rights actions. (App. A, p. 12a).

In this case, the City did not interpret or apply the ordinance, a Police Department police officer did. Since the City and Police Department are separate legal entities, and because the City could not be liable under respondeat superior even if the officer was its employee, the City should not have been held liable for the officer's mistaken interpretation and application of § 50-2. *Monell* at 694.

## II.

## THE EIGHTH CIRCUIT IMPROPERLY NARROWED THE *YOUNGER* ABSTENTION DOCTRINE.

The Eighth Circuit incorrectly narrowed the *Younger* abstention doctrine because both Kean's and Harmon's claims should have been dismissed by the District Court as Harmon was being prosecuted in Municipal Court, which is a division of the state court of Missouri, and Kean's interests were intertwined with Harmon's. The City's motion to abstain made at the District Court level was based on the *Younger* abstention doctrine because there was a case pending in the Municipal Court resulting from the citation issued to Harmon and her motion made in the Municipal Court case challenging the constitutionality of § 50-2. The District Court granted the motion and stayed the proceedings as to Harmon. However, the Court denied the motion as to Kean and allowed him to proceed with his facial challenge to the ordinance. Based on Kean's challenge, the District Court declared § 50-2 unconstitutional and enjoined its enforcement. Once the District Court declared the ordinance unconstitutional and enjoined the enforcement of the ordinance, the Municipal Court case against Harmon had to be and was dismissed. The District Court then vacated the stay as to Harmon, awarded Harmon and Kean damages and attorney's fees.

The United States Supreme Court in *Younger v. Harris*, 401 U.S. 37, 41 (1971), held that a federal court cannot enjoin a pending state court proceeding or grant declaratory relief that would effectively enjoin a state proceeding. *Accord Samuels v. Mackell*, 401 U.S. 66 (1971). In *Younger*, one of the plaintiffs had been indicted in a California state court

and charged with violation of the California Criminal Syndicalism Act. He filed a complaint in the federal district court, asking the court to enjoin the district attorney from prosecuting him, and alleging that the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments. Three other plaintiffs joined in the suit, claiming that the prosecution of Harris would inhibit their exercise of their first amendment rights. Citing 28 U.S.C. § 2283 and "longstanding judicial policy," the Court held that the judgment of the District Court which had enjoined the district attorney from prosecuting under the California statutes, was a violation of the national policy forbidding federal courts from staying or enjoining pending state court proceedings except under special circumstances. *Id.* at 40-41. The special circumstances that would allow federal intervention are where irreparable injury is real and immediate, where the state law is flagrantly violative of the constitution, or where there is a showing of bad faith or harassment. The Court held that the cost of having to defend oneself in a criminal proceeding was not irreparable injury. "[T]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 45. "It is undoubtedly true . . . that '[a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.' But this sort of 'chilling effect,' . . . should not by itself justify federal intervention." *Id.* at 50 (citations omitted). The Court held that none of the special circumstances existed in that case and that the federal courts could not interfere with the state court proceeding. The Court held that the other three plaintiffs had no standing to sue because they had not been threatened with prosecution under the California statute and the claimed "chilling effect" of Harris' prosecution was insufficient to give them standing. *Id.* at 41.

In this case, the District Court and the Eighth Circuit agreed that there was no evidence of harassment or of other special circumstances that would justify its intervention in the state court proceeding. But the District Court, by continuing the suit with Kean as a plaintiff and ultimately declaring § 50-2 to be unconstitutional and enjoining its enforcement, effectively interfered with the Municipal Court proceeding against Harmon. The Municipal Court could not continue with a prosecution under an ordinance that the District Court has held to be unconstitutional and enjoined its enforcement. So after the District Court found the ordinance unconstitutional in Kean's case, and enjoined its enforcement, the City had no choice but to dismiss its case against Harmon, who was reinstated as a plaintiff, and granted summary judgment by the District Court. The Municipal Court was never allowed the opportunity to determine whether Harmon had in fact violated the ordinance, or whether the ordinance was an unconstitutional violation of the First Amendment. This is exactly the result that the *Younger* abstention doctrine was meant to prevent. The District Court and the Eighth Circuit justified the continuation of the case with just Kean as a plaintiff by finding that the *Younger* doctrine does not apply to Kean.

Kean's relationship to Harmon cannot be ignored and in fact, it determines whether Kean's federal action should have been barred by *Younger*. The Eighth Circuit incorrectly ignored the relationship between Harmon and Kean. In *Hicks v. Miranda*, 422 U.S. 332, 348 (1975), the Court held that a plaintiff whose interests are intertwined with the interests of the plaintiff who is being prosecuted in state court is similarly barred from seeking injunctive or declaratory relief in federal court under *Younger*.

> Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obviously, their interests and those of their employees were intertwined and, as we have pointed out, the federal action sought to interfere with the pending state prosecution. Absent a clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed. The rule in *Younger v. Harris* is designed to "permit state courts to try state cases free from interference by federal courts," *Id.*, 401 U.S., at 43, 91 S. Ct., at 750, particularly where the party to the federal case may fully litigate his claim before the state court. Plainly, "[t]he same comity considerations apply," *Allee v. Medrano*, 416 U.S. 802, 831 (Burger, C. J., concurring), where the interference is sought by some, such as appellees, not parties to the state case.

*Id.* at 348-49. In *Stivers v. Minnesota*, 575 F.2d 200, 203 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979) the court held that dismissal of a federal action on the basis of the *Younger* decision was proper, even though plaintiffs were not parties in state proceedings, where plaintiffs' pleadings indicated that their interests were closely intertwined with the interest of co-plaintiffs who were state court parties,

plaintiffs' only standing to challenge the state statute arose from alleged impact which the state injunction issued against co-plaintiffs and the association would have on plaintiffs as members of the association, and plaintiffs sought by the federal action to interfere with state proceedings. The court found that the plaintiffs had made no effort to distinguish their interests from the interests of the co-plaintiffs who were parties in the state court action. *Id.*

Kean and Harmon have made no effort to distinguish their interests from each other's before the District Court or the Eighth Circuit. They together have shared their message together. Kean's claimed damages are based on Harmon's receiving a citation; he has never personally been cited or arrested under § 50-2. Virtually all of the facts recited in the District Court's orders and the Eighth Circuit's opinion refer to the Respondents as "plaintiffs" or "appellees" and makes no real distinction between Harmon and Kean. Harmon and Kean jointly sought in this single court action a declaration that § 50-2 was unconstitutional and injunctive relief to prevent enforcement of the ordinance. When the District Court granted the requested relief and enjoined any enforcement of the ordinance, it effectively decided the Municipal Court case. When the District Court reinstated Harmon's claims and granted her summary judgment in its May 26, 1998 order, it made no new factual findings because the facts are identical as to the two plaintiffs. Clearly, Harmon's and Kean's interests are intertwined.

Because Kean's claims were not dismissed or even stayed until resolution of Harmon's Municipal Court case, the result of the present case was exactly what *Younger* taught us should not happen; the District Court found the ordinance unconstitutional on its face, and as applied to Kean, whose

situation was identical in all respects to Harmon, and enjoined the City from enforcing it; the prosecutor was forced to dismiss the case against Harmon, and Harmon was able to reinstate her federal claims. The Municipal Court never got the opportunity to even determine whether Harmon's activities fell within the ordinance, let alone whether the ordinance was unconstitutional. Thus Kean and Harmon effectively took an end run around *Younger*. And now, although the Eighth Circuit found that the District Court should not have declared the ordinance unconstitutional or enjoined its enforcement, the Eighth Circuit left in place Harmon's reinstatement to the lawsuit which resulted from the improper injunction. The Eighth Circuit essentially emasculated *Younger* by not finding that both Kean's and Harmon's claims should have been dismissed.

## CONCLUSION

The City of Kansas City, Missouri passed an ordinance in 1967 banning certain types of sales on the public sidewalks. In 1996, a police officer wrote a ticket to Jill Harmon because he mistakenly believed that she had violated that ordinance. The City took no action against Ms. Harmon except that its Municipal Court ultimately dismissed the charge against her. But the City will now have to pay a $25,000 to Jill Harmon because she mistakenly received a ticket, $15,000 to John Kean who witnessed her receiving a ticket, and $73,575 to their attorney (subsequently increased to include appellate time for a total of $103,575). The City's ordinance has not been held invalid; the Eighth Circuit Panel only found that the officer, who is not an employee of the City, unconstitutionally applied the ordinance when he wrote the ticket, and that his mistaken interpretation of the facts is somehow attributable to the City. Had the Eighth Circuit

Panel agreed that the *Younger* doctrine applied to both claims in this matter, the District Court could have abstained, the Municipal Court could have then decided that the ordinance did not apply to Harmon's activity, and that would have been the end of it. For the City to be liable for over $139,000 under these circumstances is plainly a result that both *Monell* and *Younger* were meant to prevent.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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